No. 221

JUL 27 1956
JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

KANSAS CITY LIFE INSURANCE COMPANY,
Petitioner,

vs.

LILLIAN SMITH MOULDEN, formerly
LILLIAN M. SMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

MEMORANDUM BRIEF FOR RESPONDENT IN OPPOSITION

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PEERLESS PRINTING CO., DENVER

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TO the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Respondent, Lillian Smith Moulden, formerly Lillian M. Smith, respectfully prays that the Writ of Certiorari be denied for the following reasons:

Respondent adopts the statement of the case of Petitioner for the sake of brevity, but denies in general the argument of Petitioner.

This litigation involves merely a Contract of Insurance which is very binding and specific in detail and allowing no deviation from its terms. Petitioner's Contract of Insurance demanded "payment in cash" or "delivery of the policy to the insured" before becoming effective. In this case, no cash was paid and "delivery" became the control-

ling factor. By Petitioner's own Contract, the policy became effective on "Date of Delivery" and no sooner.

This case is of no importance to anyone other than the litigants themselves. The decision in both Courts below turned upon the unusual and peculiar set of facts which would occur rarely, if ever, again. Petitioner prepared the contract in question and is bound by its most specific terms. Petitioner cannot now ask this Honorable Court to alter the terms of its own Contract.

Further, there is no Federal Question involved in the litigation, nor any conflict in decisions between the various Circuits of the Court of Appeals on the question the Petitioner seeks this Honorable Court to review. Nor is there any conflict between the decision of the Courts below with any state law. The decision below merely applies the facts of the case to the Universal Principal of law that "A written instrument may not be altered, added to or enlarged at the mere whim of either party to said instrument." In examining the "When Effective" clause of the Contract, which appears on Page six (6) of Petitioner's Brief, one finds that it is unmistakably clear that without a cash payment, *delivery* controls this Contract of Insurance, as the Contract calls for cash or delivery, and as there was no cash payment to the agent, then the policy did not become effective until delivery on November 11, 1948, and was in effect on the date of the death of insured, December 11, 1949. Petitioner may not now say that because its Home Office recorded this policy of insurance at an earlier date, that it waived all other restrictive clauses in the Contract. The Policy, as written, is the controlling instrument.

For the reasons already set forth, Respondent respectfully believes that this litigation does not warrant review by this Honorable Court. This litigation involves strictly a contract question which was presented to the Court below for interpretation and determination upon the facts as presented to the trial court, and both Courts found for the Respondent in the same manner after careful and lengthy consideration. Certainly this Court need not concern itself with the mere interpretation of a Contract which would

affect only the parties to that Contract. In this case, the evidence was presented to the Courts below and carefully weighed. The Petitioner is merely asking this Honorable Court to review the adoption of the facts presented at the trial to a Contrad of Insurance prepared exclusively by the Petitioner. The District Court and the Court of Appeals affirmed the universal principal that "a written instrument may not be altered without the written consent of both parties."

One basic point upon which Petitioner relies, concerns the giving of a *Note* at the time the application was signed. Petitioner contends this was payment under the Contract and established the effective date. Had insured died between the date thenote was given and the date of *Delivery*, when a cash payment had not been made, as required by the Policy Contract itself, the Petitioner would have disaffirmed the Insurance Contract. The effect of giving a note to Petitioner, and all other questions, were carefully determined by the Courts below, and both Courts reached the same conclusion—The date of *Delivery*, in the absence of a cash payment, was the controlling factor and established the effective dateof the policy. It would be manifestly unfair to permit insurance companies to avoid their legal liabilities and responsibilities by an attempt to modify the terms of their own Contracts.

The District Court and the Court of Appeals did not depart from the accepted concept of law that a written instrument cannot be altered without the written consent of both parties.

For the foregoing reasons, it is respectfully submitted that this Petitionfor a Writ of Certiorari should be denied.

Respectfully submitted,

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